Filed 3/30/05 P. v. Copas CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. GARY RAY COPAS, Defendant and Appellant.	C045039 (Sup.Ct. No. CM017084)

A jury convicted defendant Gary Ray Copas of three counts of resisting an officer. (Pen. Code, § 69; further statutory references are to the Penal Code unless otherwise indicated.) The trial court found he had previously been convicted of burglary and two counts of voluntary manslaughter. (§§ 192, subd. (a), 459, 667, subds. (b)-(i), 1170.12, subd. (a).) He was sentenced to state prison for three concurrent terms of 25 years to life.

On appeal, defendant contends (1) the jury instructions on self-defense were legally inapplicable and prejudicially distorted the definition of the crimes defined in sections 69 and 148; and (2) evidence of his having served a prior prison term was erroneously admitted. For reasons that follow, defendant's first contention has merit and requires reversal of the judgment.

FACTS

On the evening of April 5, 2002, Officer Christian Memmott attended a police briefing at the Oroville Police Department. His sergeant informed him that defendant had an outstanding arrest warrant and was due to arrive in Oroville later that night on an intercity bus. The police had been informed that a female driving a red Chevrolet Corsica was to pick up defendant at a gas station. He was considered armed and dangerous, and was anticipated to be combative with the police.

Officer Memmott staked out the gas station with other Oroville police officers and Butte County sheriff's deputies. Memmott saw a red Corsica repeatedly drive into and out of the gas station parking lot. After the Corsica departed, a bus arrived and some passengers got off. A clerk at the gas station's mini-mart informed Memmott that a man matching defendant's description was at the counter. Memmott approached the gas station and saw defendant sitting on a bench. Defendant had a duffel bag and a cup of coffee.

Officer Memmott asked defendant for his name, and he gave the false name, "Angel Ray Hernandez." Memmott ordered

defendant to put down his coffee, but he did not comply and instead reached for his duffel bag. Memmott took the coffee from defendant, who stood up. Memmott ordered him to sit down, but he did not do so. Memmott then attempted to place defendant in a control hold so that he could be handcuffed.

Defendant pulled away from Officer Memmott and ran. Defendant was so strong that he dragged Memmott for four feet before other officers came to assist. They shouted repeatedly at defendant, ordering him to cease resisting, but he did not comply. All of the men fell to the ground, where defendant continued to struggle with the officers. Some officers delivered distraction blows to defendant's arms and head in an attempt to keep his arms away from his waistline. Eventually they managed to handcuff him. The struggle had taken the four or five officers approximately two minutes.

Defendant was taken to a hospital to have some abrasions to his face examined. While there, he unsuccessfully attempted to escape from custody. After he was medically cleared, he was taken to jail. En route he made statements to the officers: (1) about how many of them it had taken to subdue him; (2) that one officer was not a man because he had never killed anyone; (3) that he did not want to go back to prison; and (4) that they should kill him rather than incarcerate him.

Defendant called no witnesses and did not testify.

DISCUSSION

I

Defendant contends, and the People commendably concede, the trial court erred by instructing the jury with the second and third paragraphs of CALJIC No. 9.28.[1] We accept the People's concession.

The issue of whether defendant used reasonable force to defend himself is not an element of the charged offense of resisting an officer (§ 69) or the lesser included offense of obstructing an officer (§ 148, subd. (a)(1)). (*People v. Castain* (1981) 122 Cal.App.3d 138, 145 [the jury must acquit if it finds the officer used excessive force; the reasonableness of the defendant's response is irrelevant].) Thus, the second and third paragraphs of CALJIC No. 9.28, which deal with the issue of the defendant's use of reasonable force, should not have been given.

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[1] CALJIC No. 9.28 told the jury:

"A peace officer is not permitted to use unreasonable or excessive force in making or attempting to make an arrest or in detaining or attempting to detain a person for questioning.

"If an officer does use unreasonable or excessive force in making or attempting to make an arrest or in detaining or attempting to detain a person for questioning, the person being arrested or detained may lawfully use reasonable force to protect himself.

"Thus, if you find that the officer used unreasonable or excessive force in making or attempting to make the arrest or making or attempting to make the detention in question and that the defendant used only reasonable force to protect himself, the defendant is not guilty of the crimes charged or any -- of any lesser included offense."

Nor should the court have given a modified version of CALJIC No. 5.30, "Self-defense Against Assault," which defined "reasonable force" in the context of force "necessary to prevent the injury which appears to be imminent."[2] This case involved the officers' use of force necessary to make an arrest; it did not involve a defendant's use of force necessary to prevent an imminent injury.

The People contend defendant invited the error by requesting CALJIC No. 9.28. We disagree.

Defense counsel told the trial court that a number of CALJIC instructions were missing from the prosecutor's list of proposed instructions. The prosecutor acknowledged that he had omitted "a bunch of stuff on the nine series." CALJIC No. 9.28 was added following this exchange, which may reasonably be construed as a defense request for CALJIC No. 9.28. Moreover, there is an evident tactical purpose for requesting the instruction's first paragraph, which told the jury that the officers were not permitted to use unreasonable or excessive force. However, there is no discernable tactical purpose for requesting the second and third paragraphs, which do not apply to this case. The invited error doctrine does not apply to

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[2] CALJIC No. 5.30, as modified, told the jury: "'Reasonable force' means all force and all means which he believes to be reasonably necessary and which would appear to a reasonable person in the same or similar circumstances to be necessary to prevent the injury which appears to be imminent."

those provisions. (See *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 49; *People v. Hardy* (1992) 2 Cal.4th 86, 152.)

The People claim in the alternative that defendant waived his contention by failing to request a modified instruction. The People rely on this court's statement in *People v. Daya* (1994) 29 Cal.App.4th 697 that the "defendant is not entitled to remain mute at trial and scream foul on appeal for the court's failure to expand, modify, and refine standardized jury instructions." (*Id.* at p. 714.) Although *Daya* cited no authority for this proposition, it appears to be a restatement of the familiar rule that "a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." (*People v. Andrews* (1989) 49 Cal.3d 200, 218; see *People v. Lang* (1989) 49 Cal.3d 991, 1024; *People v. Sully* (1991) 53 Cal.3d 1195, 1218; *People v. Johnson* (1993) 6 Cal.4th 1, 53; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1192.)

This traditional formulation of the rule makes clear that it applies to instructions that *respond to the evidence*, not instructions that are irrelevant to the evidence and allegations. As we have seen, the parties agree that the second and third paragraphs of CALJIC No. 9.28 do not respond to the allegations and should not have been given. *Daya* does not hold that a party must object to a standardized instruction that court and counsel should know is inapplicable.

The People also contend that the error in using the unmodified CALJIC No. 9.28 was harmless. Again, we disagree.

The third paragraph of CALJIC No. 9.28 told the jurors that, *if* they found (1) the officers used unreasonable or excessive force, *and* (2) defendant used only reasonable force to protect himself, *then* defendant is not guilty of the charged crime or any lesser included offense.

This paragraph is literally true, but the converse does not follow: if the officer used unreasonable or excessive force, the defendant *is not guilty*, *regardless of whether the defendant used only reasonable force*. (*People v. Castain, supra,* 122 Cal.App.3d at p. 145.)

Reasonable jurors could conclude the evidence showed this converse of CALJIC No. 9.28: Officer Memmott applied substantial force, in the form of a control hold, before any force was used against him; *and* defendant responded with enough force to bring four or five officers to the ground in a prolonged struggle. Reasonable jurors could find that both defendant and the officer used excessive or unreasonable force.

CALJIC No. 9.28's implicit invitation to consider defendant's excessive force could have enticed reasonable jurors to believe that his great force *entitled the officers to use greater force than is otherwise permissible*. This seeming entitlement to use greater force could have dissuaded jurors from properly applying CALJIC No. 9.29, which provides that an officer who uses unreasonable or excessive force is not engaged

in the performance of his duties.[3] Contrary to the People's argument, CALJIC No. 9.29 does not cure the prejudice that flowed from the erroneous portions of CALJIC No. 9.28.

In sum, it is reasonably likely the jurors understood the last paragraphs of CALJIC No. 9.28 to imply that defendant's use of excessive or unreasonable force barred his acquittal even though the officers used unreasonable or excessive force. (*People v. Clair* (1992) 2 Cal.4th 629, 663; *People v. Kelly* (1992) 1 Cal.4th 495, 525-526.) On this record, which shows both sides applying substantial force, we cannot say the error was harmless.

II

Defendant contends the trial court erred by allowing evidence of his having served a prison term. We consider the issue for the guidance of the court in the event of retrial.

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[3] CALJIC No. 9.29 told the jury:

"In a prosecution for violation of Penal Code section 69 or 148, which I'm going to get to in a minute, the People have a burden of proving beyond a reasonable doubt that the peace officer was engaged in the performance of his duties.

"A peace officer is not engaged in the performance of his duties if he makes or attempts to make an unlawful arrest or detention or uses unreasonable or excessive force in making or attempting to make the arrest or detention.

"If you have a reasonable doubt that the peace officer was making or attempting to make a lawful arrest or detention or using reasonable force in making or attempting to make the arrest or detention and, thus, a reasonable doubt that the officer was engaged in the performance of his duties, you must find the defendant not guilty of any crime which includes an element that the peace officer was engaged in the performance of his duties."

Background

On direct examination, the prosecutor asked Butte County Sheriff's Deputy Tim Morris if he recalled statements defendant had made as he was being taken from a patrol car to the jail. Deputy Morris stated: "I do recall him making statements on the ride over and as we pulled into the sheriff's office that he did not want to go back to prison."

The prosecutor interrupted Deputy Morris and asked to approach the bench. He explained to the trial court and defense counsel that he had not known about the prison statement. Defense counsel opined that the statement was "huge," and asked to make a record at the break.

Out of the jury's presence, Deputy Morris testified that he had been admonished not to mention that defendant had assaulted two Redding police officers and that he had been convicted of two homicides. Deputy Morris could not recall whether he had previously related defendant's prison statement to any participant in the trial. Deputy Morris claimed he recalled defendant's statement as he "was sitting here," on the witness stand.

Following a lunch break, defense counsel indicated that he was contemplating a mistrial motion. Counsel asked the trial court for its view, and the court and both counsels conferred off the record. Then the court indicated that the motion would be reserved until later in the proceeding.

At the close of the prosecution case, defense counsel reiterated that there was a "possible mistrial issue." The

trial court responded that its "initial impression" was not to grant a mistrial.

Defense counsel then asked to "put a minute on the record about it." He stated, "Obviously, I think it was prejudicial about the prison. This was an issue, did he resist? To what level? I think if somebody knows he is going to go back to prison, they're going to think he will probably resist harder."

The trial court responded, "That's the reason for the Court's ruling it is relevant. Even if I had known about it before at the beginning of trial, I would have permitted it for that motive because the probative value outweighs any prejudicial effect." Defense counsel did not pursue the matter further.

Analysis

The People claim defendant cannot challenge the admission of his statement because he "made no timely objection or motion for mistrial." We disagree.

Defense counsel had no opportunity to object in front of the jury. Immediately after the disputed remark, the prosecutor interrupted Deputy Morris's testimony and requested a bench conference. At the bench, defense counsel opined that the statement was "huge, in my mind." The trial court accepted counsel's offer to make his record on the issue at the break. At the break, the matter was further discussed off the record and again deferred. At the close of the prosecution case, counsel put his argument regarding prejudice on the record. The court acknowledged that the issue was the balancing of prejudice

and probative value pursuant to Evidence Code section 352. The People's claim that defendant waived the issue by failing to make a "timely and specific" objection on section 352 grounds elevates form over substance and has no merit.

Alternatively, a formal objection would have been futile because the trial court's comments indicate that a timely objection would have been overruled. (See *In re Antonio C.* (2000) 83 Cal.App.4th 1029, 1033.)

Defendant does not make an argument about the mistrial motion, which, he concedes, "may not have been made or ruled upon." Instead, he claims the trial court's balancing of prejudice and probative value was an abuse of discretion. We disagree.

"Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. [Citation.] Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125; italics in original.)

"The governing test . . . evaluates the risk of 'undue' prejudice, that is, '"evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which

has very little effect on the issues,"' not the prejudice 'that naturally flows from relevant, highly probative evidence.' [Citations.]" (*People v. Padilla* (1995) 11 Cal.4th 891, 925, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

We shall assume for purposes of argument that evidence that defendant had been to prison tends to evoke an emotional bias against him as an individual. (*People v. Padilla, supra,* 11 Cal.4th at p. 925.) However, as defense counsel effectively acknowledged, and the trial court found, the evidence has a significant effect on the issues in that it shows a motive for the offenses. (*Ibid.*) In particular, it provides a motive for defendant to have resisted vigorously, thus requiring the officers to use greater force to subdue him than might otherwise have been the case. This, in turn, suggests that the officers' use of substantial force was reasonable under the circumstances. As in *United States v. LeMay* (9th Cir. 2001) 260 F.3d 1018, on which defendant relies, the prejudicial effect was not so far out of proportion to the probative value as to deny him due process. (*Id.* at p. 1030.)

Defendant retorts that his motive was to avoid *future* incarceration, and the "desire to avoid incarceration is virtually inherent in the crime itself." That may be so, but reasonable jurors could deduce that the desire is greatest where, as here, it is informed by prior experience with prison. Defendant's argument that his past incarceration had "hardly any probative value at all" has no merit.

Had the trial court's balancing of prejudice and probative value occurred as part of an evidentiary ruling, there would have been no miscarriage of justice. (*People v. Rodrigues*, *supra*, 8 Cal.4th at pp. 1124-1125.) Had defendant moved for a mistrial on the ground of erroneous admission of evidence, denial of that motion would not have been an abuse of discretion.

DISPOSITION

The judgment is reversed.

MORRISON, J.

We concur:

BLEASE, Acting P.J.

ROBIE, J.